IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

No. 76-1265

NATIONAL ASSOCIATION OF REGIONAL MEDICAL PROGRAMS, INC.,

and

LAKES AREA REGIONAL MEDICAL PROGRAM, INC. and MEDICAL CARE DEVELOPMENT INCORPORATED on behalf of themselves and all others similarly situated,

Petitioners,

v.

THE HONORABLE JOSEPH A. CALIFANO, JR., individually and as Secretary of Health, Education, and Welfare; THE HONORABLE ROY L. ASH, individually and as Director of the Office of Management and Budget, HERBERT B. PAHL, individually and as Acting Director of the Regional Medical Programs Service of the Department of Health, Education, and Welfare; THE HONORABLE GEORGE PRATT SCHULTZ, individually and as Secretary of the Treasury, ELMER B. STAATS, individually and as Comptroller General of the United States,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioners respectfully pray that a writ of certiorari issue to review the judgment and memorandum opinion of the United States Court of Appeals for the District of Columbia Circuit entered in this proceeding on December 13, 1976.

OPINIONS BELOW

This petition seeks review of an unpublished decision of the court of appeals affirming an order of the district court denying petitioners' motion to compel compliance with the final order as amended. The district court's original decision is unreported, and was rendered in the form of Findings of Fact and Conclusions of Law and a Final Order, on February 7, 1974. 1A-18A. The Final Order was amended by consent on July 22, 1974, and this amendment, also unreported, is set out at 19A-21A. Thereafter petitioners moved to compel compliance with the final order as amended, and this motion was denied by an unreported order of the district court. 22A-24A. This order was affirmed by an unpublished Judgment and Memorandum of the court of appeals. 25A-26A.

The Court's attention is respectfully invited to the pendency of a related case growing out of the same litigation. The attorney for petitioners herein, Jerome S. Wagshal, applied for the award of a fee under the "common benefit" rule after entry of the amendment to the Final Order, and such a fee was awarded by the district court. The decision awarding this fee is reported at 396 F. Supp. 842. This awarded was reversed by the court of appeals in a decision entered at the same time as the decision involved in this petition, December 13, 1976, and that decision is as yet unreported. The attorney for petitioners herein and these petitioners are contemporaneously herewith seeking a writ of certiorari for review of that decision.

JURISDICTION

The judgment of the Court of Appeals for the District of Columbia Circuit was entered on December 13, 1976, and this petition for certiorari is filed within ninety days

thereafter. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTION PRESENTED

Did the lower courts err in permitting the defendant government officials to "lapse" $1,819,997 into the treasury when this money was part of an appropriation made under Title IX of the Public Health Service Act, 42 U.S.C. §§299 *et seq.*, and three other statutes required the Executive to fully obligate and expend these funds, and barred the "lapse" of the funds into the treasury.

STATUTES INVOLVED

31 U.S.C. §665b, 87 Stat. 134

Any provision of law which requires unexpended funds to return to the general fund of the Treasury at the end of the fiscal year shall not be held to affect the status of any lawsuit or right of action involving the right to those funds.

42 U.S.C.A. §201 note, 84 Stat. 353 (referred to herein as "Sec. 601")

Notwithstanding any other provision of law, unless enacted after the enactment of this Act expressly in limitation of the provisions of this section, funds appropriated for any fiscal year ending prior to July 1, 1973, to carry out any program for which appropriations are authorized by the Public Health Service Act . . . shall remain available for obligation and expenditure until the end of such fiscal year.

Pub.L. 93-245, §501, 87 Stat. 1077

Any funds necessary to be appropriated for full obligation of a fiscal year 1973 appropriation determined to have been unlawfully impounded by the executive branch of the United States Government in a civil action filed on or before June 30, 1974, are hereby appropriated out of any money in the Treasury not otherwise appropriated. Such appropriations shall remain available for obligation through the later of the day on which a final determination finding the impoundment legal is made or one year following the day on which the impoundment is found illegal.

STATEMENT OF THE CASE

This petition seeks reversal of an unpublished judgment of the court of appeals affirming an order of the district court denying petitioners' motion to compel compliance with the Final Order as amended.

In essence this petition seeks the release of over $1.8 million which was appropriated by the Congress for the Regional Medical Programs under Title IX of the Public Health Service Act, 42 U.S.C. §§299 *et seq.* Petitioners claim that Congress has mandated the full release of this money by three explicit statutes, and that this sum is the vestige of an unlawful impoundment declared unlawful in the Final Order as amended. This case is therefore an anti-impoundment action, seeking to prevent the defendant government officials from withholding funds from grantees which the Congress has required be fully obligated and expended.

This case was originally brought to effect the release of regional medical program ("RMP") grant funds which the defendant government officials were unlawfully withholding from the plaintiff class of RMPs. After the district court entered a decision favorable to the plaintiff

class on February 7, 1974, 1A-18A, the defendant government officials (hereinafter sometimes the "defendants") moved to amend the Final Order, and a consent amendment was entered on July 22, 1974. 19A-21A. Thereafter, the attorney for the plaintiff class applied for a class action fee award, and in the course of the proceedings leading to the determination of that application, discovery was sought of defendants to determine the amount of money released to the plaintiff class members. By the defendants' responses it was learned that over $1.6 million had not been released to the RMPs. (It was later learned that the amount which had not been released was actually in excess of $1.8 million.) Accordingly, plaintiffs filed a motion to effect release of these funds, *i.e.*, to compel compliance with the Final Order as amended.

The facts of this matter are best stated in three parts: A. The final order and its amendment; B. the district court's denial of plaintiffs' motion to compel compliance with the final order as amended; and C. the decision of the court of appeals affirming the district court's denial of plaintiffs' motion.

A. The Final Order And Its Amendment

The issue in this petition turns on the question of whether Congress mandated that certain money be released to the plaintiff class members. This question was before the district court when it rendered its Final Order, and also when it amended that order. The district court's determination at each of these stages must therefore be detailed for an understanding of petitioners' position.

1. The Final Order

Although this case grew out of the massive "impoundment" of HEW grant funds by the Nixon Administration,

the Findings of Fact ("FF") and Conclusions of Law ("CL") were most detailed and explicit about the amounts appropriated and improperly withheld from the plaintiff class. The judgment for plaintiffs was not merely a broad brush condemnation of impoundments.

For FY 1973, the district court found that the RMP appropriation was $150 million. FF 10, 5A. It went into detail as to the amounts impounded by defendants. *Id.*, FF 11-12. And for FY 1974 the court found the mandatory sum which had to be granted to the RMPs was $77,855,000. FF 14-16, 6A. The court ordered that these sums be obligated and granted to the plaintiff class members. 17A-18A.

This order for full obligation to the plaintiff class was grounded on the conclusion that the Executive had no Constitutional authority to withhold these sums from the plaintiff class. CL 12, 14A. The district court rejected the arguments advanced by the defendant government officials that they had authority to withhold these sums, because it found that Congress had enacted statutes which required that these sums be obligated and expended. Three statutes specifically relied on by the district court were:

– Sec. 601 for the Medical Facilities Construction and Modernization Amendments of 1970, 42 U.S.C.A. §201 note, as extended to FY 1974 by the Health Programs Extension Act of 1973, Pub.L. No. 93-45, 87 Stat. 91. CL 5, 12A. (Hereinafter referred to as "Sec. 601.)

– Sec. 111 of Pub. L. No. 93-52, later codified as 31 U.S.C. §665b. CL 10, 13A.

– Sec. 501 of Pub. L. No. 93-245, 87 Stat. 1077. (Hereinafter referred to as "Sec. 501.) CL 11, 14A.

The court relied most heavily on Sec. 601. It found that this statute

> . . . is intended to prevent administration imposed freezes, reductions and rollbacks. This had been acknowledged by defendant Weinberger and by the President, as well as by defendant Ash's predecessor.

FF 21, 7A. Accordingly it held that

> By enactment and extension of Sec. 601, *the full obligation and expenditure of all funds appropriated for the RMP authority has been mandated* by Congress for fiscal 1973 and 1974 *without administration imposed* freezes, *reductions* or rollbacks. (Emphasis added)

CL 6. 12A. *See also,* CL 9, 13A; CL 15, 15A.

2. Amendment to the Final Order

Shortly after entry of the Final Order, defendants moved to amend it so as to permit obligation of about $30 million of the FY 1974 funds to recipients other than the RMPs, under a contracting authority contained in the RMP statute, Sec. 910 of the Public Health Service Act, 42 U.S.C. §299j. This motion was finally resolved by a negotiated settlement which amended the Final Order in only one respect. Defendants were permitted to obligate not more than $5 million to Sec. 910 activities, which were specifically designated in the amendment. 19A-21A. In all other respects the Final Order remained as originally entered, and by this settlement all parties waived their rights of appeal. 21A, para. 3.

B. The District Court's Denial of Plaintiffs' Motion To Compel Compliance With The Final Order As Amended

After what was thought to be the final resolution of the case on the merits, the attorney for the plaintiff class applied for a class action fee award. As part of this application, discovery was filed to ascertain the amounts

released to the plaintiff class. After unsuccessful attempts to avoid responding, defendants admitted that they had allowed $1,644,825 in FY 1973 and FY 1974 RMP appropriations to "lapse" into the general fund of the Treasury, that this sum had not been obligated to the plaintiff class.

By their interrogatory answers, the defendant officials claimed that this RMP money had been somehow allocated to "direct operations," *i.e.*, "to support staffing and other related costs of the HEW Division of Regional Medical Programs . . . associated with: the evaluation, processing, and award of grants; the provision of technical assistance to grantees. . . ." In other words, the money was intended by the Secretary to be used within the Department of HEW itself to administer the RMPs but had been found to be in excess of what was needed for the HEW expenses, and so sent back to the Treasury.

Defendants' interrogatory answers admitted that there was no separate or identifiable "direct operations" appropriation for the RMP authority. Rather defendants asserted that there was some kind of arcane administrative process by which the "direct operations" sum was administratively set aside within the overall RMP appropriation. According to defendants, their "normal procedures" were that after the House of Representatives appropriated money for the RMPs, the Department of HEW would "submit an Effect of House Action Statement to the Senate Appropriations Committee for use by the members and staff in their deliverations," and this "Effect of House Action Statement" provided an "activity sub-break" showing the amount to be used for "direct operations." Defendants interrogatory answers characterized the "Effect of House Action Statement" as "an internal working document."

When asked for any indication of Congressional approval of this "sub-break," defendants admitted that there was no mention of "direct operations" in the applicable House report for FY 1973, but suggested a negative inference could be drawn from a statement in a Senate report which related to a sum never appropriated by the Congress. For FY 1974, defendants claimed that they had submitted an "Effect of House Action Statement," which had been presented "for consideration by the House and Senate Appropriations Committees," but could point to no sign from the Congress that such a "Statement" had received approval of any committee, much less the Congress itself. The core of defendants' position was that Congressional silence after submission of such a "Statement" was tantamount to Congressional approval of the allocation, and, even more, that Congressional silence evinced Congressional intent that the designated sum in the HEW "statement" could be used *only* for "direct operations" and could not be used for grants to the RMPs themselves.

Plaintiffs then moved to compel compliance with the Final Order as amended by requiring the release of the "lapsed" sum. During the course of the briefing on this motion, defendants submitted an affidavit admitting that the total which they had "lapsed" was $1,819,997—$445,301 for FY 1973 and $1,374,696 for FY 1974.

The district court denied this motion. 22A-24A. The court disregarded the provisions regarding the amounts to obligated as stated in its Final Order as amended, and held that it had merely ruled

> in essence, . . . that defendants must take all steps necessary to carry out the Congressional appropriation, namely to undertake the continued administration and implementation of the RMP authority.

Although there had been no evidentiary hearing, the court accepted defendants' affidavit averments that it was "normal" that "when funds in one activity are not fully expended to allow those funds to lapse into the Treasury. This occurred in the instant case." 23A. The court concluded that "defendants have complied substantially with the court's final order as amended. . . ." 23A.

C. The Decision of The Court of Appeals Affirming The District Court's Denial of Plaintiffs' Motion

The court of appeals affirmed. The grounds for affirmance were that the Final Order as amended had provided "that the illegally impounded funds were to be obligated and expended as was 'usual and normal prior to February 1973, when defendants began their unlawful impoundments.' "[1] The court of appeals noted that the district court had found that it was "normal" for HEW to divide the RMP funds between district operations and grants, and "also normal for the unexpended balances of these funds, whether they are labeled direct operations or grants, to lapse into the United States treasury at the end of each fiscal year." 26A.

Under the local rule this was an unpublished opinion.

Jurisdiction in the district court was based on 28 U.S.C. §§1331 and 1361. CL 1, 12A.

REASONS FOR GRANTING THE WRIT

This petition seeks correction of a clearcut "impoundment," a refusal by officials of the Executive Branch to obligate and expend money which the Congress has statutorily mandated ~~by~~ to be obligated and expended. This

[1]This terminology in the Final Order was not directed at the question of "lapse" of direct operations funds; the "lapse" of these funds was unknown at that time and only discovered later.

issue goes to Constitutional bedrock. In the original litigation leading to the Final Order, the defendant government officials squarely raised Constitutional issues, maintaining that the Executive has the right under Article II of the Constitution to defy statutory mandates for full expenditure. And the district court gave a direct answer to these arguments, rejecting the Constitutional authority claimed by the defendants. CL 12, 14A; CL 14, 14A-15A.

Having been turned back on their Constitutional argument defendants are now taking another tack, attempting, so far successfully, to withhold some of the designated money by representations regarding "normal" administrative practice, the effect of Congressional silence, and similar assertions, none of which has ever been subjected to adversary examination, or traditional modes of proof. But even if "normal" administrative practice were established, as defendant's claim, this would not move this case out of the category of a confrontation between the Executive and Congress.

The question of whether defendants are entitled to withhold $1,819,997 from the plaintiff class is, as shown below, governed by three explicit statutes which say that they cannot do so. Inexplicably, the district court, after relying on these three statutes in arriving at its Final Order, ignored them in ruling on plaintiffs' motion to compel compliance with its order. Equally inexplicably, the court of appeals ignored these statutes as well.

Thus correction of this error can at this point be made only by this Court.

We can find no precedent for such repeated refusals at two levels of the federal judicial system to take note of statutes which mandate a different result from that arrived at. Petitioners respectfully submit that it is neither fitting nor in keeping with the proper function of

the Judicial Branch that, when such an issue is presented to the courts, the controlling statutes should be ignored. The effect of such judicial nonrecognition of statutory enactments is to subvert the Constitutional role of the Congress even more than the original impoundments which led to the enactment of these statutes. When the Judiciary as well as the Executive treat solemn Acts of Congress as nonexistent—and do so not because the statutes offend the Constitution nor for any other stated reason—merely by refusing to recognize them—how can our Constitutional system be said to retain its original form?

The seriousness of the error committed by the district court and the court of appeals can be appreciated only by analysis of the three statutes which they ignored, and it is to this which we now proceed.

A. Sec. 601

Sec. 601 is phrased in the obscure wording of federal accounting procedures, and its statutory mandate for full expenditure can only be understood by those unfamiliar with federal accounting by reference to the legislative history of Sec. 601. As noted *supra*, the district court found that Sec. 601 required "the full obligation and expenditure of all funds appropriated for the RMP authority . . . without Administration imposed . . . reductions. . . ." CL 6, 12A. The legislative history of Sec. 601, which supports this conclusion is alluded to in FF 21, 7A. However, it is set out in greater detail in *National Council of Community Mental Health Centers, Inc. v. Weinberger*, 361 F.Supp. 897, 902-3 (D.D.C. 1973).

This legislative history includes the fact that after its initial passage in 1970, Sec. 601 was vetoed by then President Nixon because, as was stated in his veto message:

> Here, the Congress insists that the funds appropriated for any fiscal year through 1973 to carry out the programs involved *must be spent.* (emphasis added)

H.R.Doc. 91-353, 116 Cong.Rec. 10876 (1970). Congress overrode this veto with the full understanding that in doing so, it was imposing "a requirement that all the money we appropriated be spent." 116 Cong.Rec. 22267. When §601 was extended to FY 1974 it was again recognized as a Congressional mandate for full and complete expenditure of the sums being appropriated. See H.R.Rep. 93-227, p. 15.

By its terms, Sec. 601 applies, "Notwithstanding any other provision of law, unless enacted after the enactment of this Act expressly in limitation of the provisions of this section. . . ." This provides a full answer to any arguments respondents might make about the effect of their "Statements" submitted to the Congress, and Congress' silence in the face of these statements.

B. 31 U.S.C. §665b.

The second statute overlooked by the district court and the court of appeals is 31 U.S.C. §665b. Enacted on July 1, 1973 as Pub. L. No. 93-42, §111, this statute was the first expression of Congressional concern about the effect of the FY 1973 impoundments, and the possibility that the impounded funds might "lapse" into the treasury and become unreachable because of the close of the fiscal year.

This statute provides an explicit and irrefutable statement showing the error of the court of appeals' conclusion (26A.) that the RMP funds

> . . . whether they are labeled direct operations or grants, . . . lapse into the United States treasury at the end of each fiscal year.

For this statute says that

> Any provision of law which requires unexpended funds to return to the general fund of the Treasury at the end of the fiscal year shall not be held to affect the status of any lawsuit or right of action involving the right to those funds.

The Congress' intent was made explicit, to preserve the rights of "all parties" who might be affected by failure of the Executive to obligate and expend the appropriated funds before the end of the fiscal year. See S.Rep. No. 93-414, pp. 5-6.

Surely such a direct statutory mandate should not be invalidated simply by being judicially ignored.

C. Sec. 501

Despite passage of 31 U.S.C. §665b., the Administration continued to oppose suits filed after July 1, 1973 for the release of impounded FY 1973 funds, and to argue that these funds had irrevocably "lapsed" into the general fund of the treasury. Congress, seeing that two prior statutes had not sufficed to lay the issue to rest, acted yet a third time by passage of Sec. 501 which reappropriated any funds which the Administration was arguing had lapsed. This statute reappropriated

> [a]ny funds necessary to be appropriated for full obligation of a fiscal year 1973 appropriation[2] determined to have been unlawfully impounded by the executive branch of the United States Government in a civil action filed on or before June 30, 1974. . . .

[2] §501 applies only to FY 1973 funds because it was passed in FY 1974, *i.e.*, before FY 1974 had ended and thus before there was any issue as to the "lapse" of unexpended FY 1974 balances. However the overall Congressional intent for both years is clear.

The legislative history of this statute makes two things clear; first, that the intent of Congress was that the impounded funds be fully obligated and expended even before enactment of Sec. 501. And second, that by the enactment of Sec. 501, the Congress was seeking to negate the Administration's "technical" argument that the impounded funds could lapse into the treasury at the end of the fiscal year. All this was made explicit:

> Various cases brought after June 30, 1973, are now seeking to effect the release of . . . impounded funds. *The intent of the Congress was clear that fiscal 1973 appropriations for certain Department of HEW activities* [including the RMP authority] *be fully obligated* in fiscal 1973. However the Administration is now contending in these cases, that these funds, although unlawfully impounded, may not now be ordered obligated because they were brought after the close of the fiscal year. This issue is currently before the Courts and need not be directly addressed. To avoid such a technical defense, however, this provision appropriates these impounded sums and makes them fully available for obligation pursuant to court order. . . . The effect of this Section . . . therefore, is to reappropriate fiscal 1973 appropriations *if* such reappropriation is necessary for *full release of the fiscal 1973 impounded funds.* (emphasis added)

S.Rep. No. 93-614. The House concurred. See Conference Report on H.R. 11576, H.R. Rep. 93-736, p. 14.

* * *

In addition to the three statutes reviewed above, the Congress subsequently enacted impoundment control legislation, which included specific disclaimers relevant to this petition—that nothing in that act should be construed as ratifying any impoundment previously executed; affecting the claims or defenses "of any party

to litigation concerning any impoundment;" or "superseding any provision of law which requires the obligation of budget authority or the making of outlays thereunder." 31 U.S.C. § 1400.[3]

Petitioners submit that the judicial refusal to take cognizance of three controlling statutes which occurred in this matter is unparalled. Unless this Court exercises its supervisory power, an encroachment by the Executive on the basic Constitutional role of the Congress will become final by judicial sanction, and the pattern of our form of government will thereby be marred.

CONCLUSION

For the reasons stated herein, petitioners pray that this petition be granted and a Writ of Certiorari issue to review the judgment of the court of appeals.

Respectfully submitted,

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[3] The court may note that in the petition for certiorari being filed contemporaneously to this one by petitioners herein and their attorney, the question of use of RMP "direct operations" funds is also involved. Certain "direct operations" money was reserved by the district court to provide supplemental grants to the RMPs after they paid their fee to the class attorney. As more fully explained in the other petition, this was overturned by the court of appeals.

APPENDIX

APPENDIX

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 1807-73

NATIONAL ASSOCIATION OF REGIONAL MEDICAL PROGRAMS, INC., et al.,

Plaintiffs,

v.

THE HONORABLE CASPAR W. WEINBERGER, et al.,

Defendants.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This is a class action by Regional Medical Programs (RMP's) seeking equitable relief, including declaratory judgment, injunction and mandamus. This action questions defendants' impoundment of funds appropriated for the RMP authority under Title IX of the Public Health Service Act, as amended, 42 U.S.C. §§229 *et seq.*, and other restrictions placed by defendants on the operations of RMP's. This matter came before the court upon cross motions for summary judgment. Upon consideration of the pleadings, motions, memoranda in support thereof, affidavits and exhibits, and the court having heard testimony and oral argument of counsel, the court makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

I. *General Operation of the RMP's*

1. In general, the purpose of a Regional Medical Program is to provide a vehicle by which scientific knowledge can be more readily transferred to providers of health services and by so doing improve the quality of health care provided. Each regional Medical Program is administered by a grantee which is responsible for management of the RMP grant in such a manner as to implement the program established by the Regional Advisory Group (*i.e.* the organized voluntary body of health providers and consumers in each Regional Medical Program which has responsibility for program and project determinations and overall program direction) in accordance with Federal regulations and policies.

2. Once a Regional Medical Program has achieved operational status, grant funds are awarded for both program and operational activities. Program activities are those functions central to the RMP's operation. They encompass all activities performed by the Program staff, including administration, consultation, project development and management and evaluation. Operational projects are those activities which are supported totally or in part by RMP grant funds and are conducted by affiliated institutions and organizations. Each such activity must go through the Program's review process and be approved by the Regional Advisory Group.

3. The concept of time-limited support has always been central to RMP's. This concept embodies the idea of "seed money," or RMP investment in a specific activity only for the period of time necessary to get it initiated and accepted by the community. In the past it has been the policy of the Regional Medical Programs Service of HEW (RMPS) that RMP support to a particular project be

terminated after a three-year period, although allowances of up to 24 months after that time have been made to ensure orderly termination of projects. In the majority of cases, those projects from which RMP grant support has been withdrawn have been continued with funds from other sources such as State and local governments or private health care providers. Some projects are of course, deliberately discontinued by the RMP's with no further funding sought from within the community. Because the nature of the RMP program is to a large extent one of demonstration and testing, evaluation of some activities proves them to be either of little value in meeting health care needs or unsuccessful in terms of achieving their stated objectives. In other instances, projects may have time limited objectives which, once met, do not call for continuation.

4. Before February 1, 1973, RMP's operated on the basis of a "Mission Statement" published by the RMPS after approval by the National Advisory Council for Regional Medical Programs, copy of which is attached to the complaint in this action as *Exhibit 2.* This "Mission Statement" defined the scope of activities of RMP's and permitted them to engage in operational activities in the full range of purposes of the statute which authorized the creation of RMP's.

5. In the period immediately preceding February 1, 1973, the existing RMP's throughout the country were conducting large numbers of operational activities through their core staffs in cooperation with other organizations, institutions, and individuals, or by contracting for specific services with such other parties. These operational programs covered the full range of the RMP statutory purposes, including the effective delivery of primary health services, emergency medical services, and programs to regionalize care in the categorical

illnesses of heart disease, cancer, stroke, kidney disease and related diseases.

6. The various operational activities being carried on by RMP's prior to February 1, 1973 were complex in nature requiring the cooperation and joint efforts of many individuals and institutions. Considerable time was necessary to organize and set up these activities before they could become operational and further time was necessary for them to be productively completed. Almost all of the specific operational activities authorized by the RMP's were planned for and generally run for an operating period of between one and three years. As a general rule, each such specific activity was approved by the National Advisory Council for Regional Medical Programs (NACRMP).

7. In addition, 41 of the existing 53 RMP's had so-called "triennial status" prior to February 1, 1973. This status meant essentially that authority for the choice of specific operational activities and priorities was delegated to the Regional Advisory Group for each "triennial" RMP. Any operational activity within the scope of the statutory purposes and the general three-year program of the RMP as approved by the NACRMP could be authorized.

8. In reliance on this delegation of authority, triennial RMP's, as of February 1, 1973, had initiated and were conducting a large number of approved operational activities and had planned many others which were approved. RMP's without triennial status obtained required specific NACRMP and RAG approval for each operational activity.

9. The RMP Act was first enacted as Title IX of the Public Health Services Act, Pub. L. 89-239, 79 Stat. 926 *et seq.* on October 6, 1965. Appropriations were authorized for each fiscal year from 1966 through 1970.

In 1970 the Act was amended to authorize appropriations for fiscal 1971, 1973 and 1973. Act of June 30, 1970, Pub. L. 91-296 Title IV, 84 Stat. 352. Appropriation authority for fiscal 1974 was granted the RMP's by the Health Programs Extension Act of 1973, Pub. L. 93-45, Title I, §110, 87 Stat. 91, June 18, 1973. There is no present authorization for appropriations for RMP's after fiscal 1974.

II. *Fiscal 1973 Impoundment*

10. The authorized appropriation for fiscal 1973 was $250,000,000. $150,000,000 was actually appropriated for the RMP authority and activities in fiscal 1973.

11. In fiscal 1973, defendants made $55,358,000 available to the RMP authority, leaving an impounded balance of about $94,642,000.

12. Of the aforesaid $55,358,000, defendants "obligated" but have prevented the expenditure of $6,900,000 by the members of the plaintiff class. In addition, $2,450 of the $55,358,000 released by defendants was not "obligated" prior to June 30, 1973. Thus the total fiscal 1973 RMP impoundment is about $101,544,450.

III. *Fiscal 1974 Impoundments*

13. On July 1, 1973 the President approved Pub. L. 93-52, a Joint Resolution making continuing appropriations for a portion of fiscal 1974. For most of the first half of fiscal 1974, until December 19, 1973, the RMP appropriation was made by this Continuing Resolution, as extended, which established a rate of spending of $81,953,000, annualized, for RMP's. Such a rate would be slightly over $6,829,000 per month, or about $20,488,250 per quarter.

14. On August 28, 1973, the Department of Health, Education and Walfare allocated $17,100,000 to support Regional Medical Programs through December 31, 1973. In addition $2,000,000 was allocated for use through June 30, 1974 specifically to support identified pediatric pulmonary centers and $1,000,000 was allocated for the cost of direct operations performed by the Regional Medical Programs Service of the Department of Health, Education and Welfare. On September 7, 1973 these amounts were released by the defendants for spending by the RMP's. Thus, for the first half of fiscal 1974 the defendants released a total of $20,100,000 for RMP's.

15. On November 7, 1973 the RMPS received authorization to obligate a total of $44,900,000 for RMP grants and contracts during fiscal year 1974.

16. The authorized appropriation for fiscal 1974 was $159,000,000. On December 19, 1973, the President signed the fiscal 1974 Labor-HEW Appropriation bill, Pub. L. 93-192. Pub. L. 93-192 actually appropriates $81,953,000 for the RMP authority and authorizes the Executive to hold back not more than 5% of this amount. Accordingly, the fiscal 1974 RMP appropriation required to be obligated by the Executive Branch is $77,855,000.

IV. *As to Fiscal 1973 and Fiscal 1974 Impoundments*

17. A Treasury warrant covering funds previously withheld for fiscal 1973 and 1974 was requested and was received by the Department of Health, Education and Welfare on January 24, 1974. Because of the categories used and the sums stated the court cannot determine whether the withheld appropriations in this case are in fact covered in the warrant. The warrant was issued pursuant to Sec. 501, Pub. L. 93-245, as supplemented by Pub. L. 92-334, which provides for appropriation of

fiscal 1973 funds adjudicated to have been unlawfully impounded.

18. Historically, the annual appropriation for each RMP was made available for the entire fiscal year at the beginning of its operational year. This enabled RMP's to plan their year's operation and make arrangements and contracts with other cooperating institutions, groups and individuals. Defendants' actions in withholding release of fiscal 1973 and 1974 funds caused RMP activities to lose effectiveness and qualified staff personnel.

19. Defendant Ash through the Office of Management and Budget has taken part in the withholding of RMP appropriations.

20. Defendants maintain that the Executive Branch has the Constitutional power to withhold obligation and expenditure of appropriated funds regardless of statutory requirements that such funds be obligated and expended.

21. Appropriations for RMP's are covered by Section 601 of the Medical Facilities Construction and Modernization Amendments of 1970, as amended, 42 U.S.C.A. §201 note, a statute which is intended to prevent administration imposed freezes, reductions and rollbacks. This has been acknowledged by defendant Weinberger and by the President, as well as by defendant Ash's predecessor.

V. *Time Constraints on RMP Authority*

22. The Executive's fiscal 1974 Budget, submitted to Congress in January 1973, proposed phasing out RMP authority. No funds for the RMP program were included in the 1974 Budget request.

23. On February 1, 1973, defendants issued a telegram to all RMP's announcing termination of all grants on June 30, 1973, the date on which RMP

statutory authority was to lapse. Each RMP was required to complete a phase out plan by February 15, 1973 for submission to RMPS by March 15, 1973.

24. By directive dated February 11, 1973, defendants issued detailed instructions for effecting this phase out by June 30, 1973. Certain circumstances, however, justified continuation of some activities into fiscal 1974. In no event were activities of any kind to be continued beyond February 15, 1974.

25. Upon passage of the Health Services Extension Act, *supra*, ¶9 and the fiscal year 1974 Continuing Resolution, the Department of Health, Education and Welfare authorized the RMPS to negotiate with each RMP a level of support to assure its viability through September 30, 1973. Such level, however, could not exceed the actual average monthly expenditure for each RMP for the period April 1 through June 30, 1973.

26. On September 7, 1973, a Health, Education and Welfare directive advised all RMP's that they should not plan to make any expenditure of grant funds beyond June 30, 1974. The directive further required RMP's to engage only in operational activities which could be "productively completed" by the end of fiscal 1974.

27. This June 30, 1974 limitation remains in effect. *See* Letter to Jerome Wagshal from Harland F. Leathers, January 11, 1974. The effect of this policy taken together with the Department's partial funding for 1973 and 1974 tends to prevent or materially impede RMP's from operating at the program level anticipated by Congress.

VI. *Subject Matter Constraints on RMP Authority*

28. The September 7, 1973 directive also announced the following "Priorities and Options" for the funding of RMP activities for fiscal 1974:

A. *Strengthening Local Planning Processes*

This includes some financial as well as professional and technical assistance by program staff aimed at increasing provider inputs to State and areawide health planning efforts. Particular emphasis will be placed on: (1) assisting with implementation of the cost containment provisions (Section 1122) of the Social Security Amendments of 1972 and (2) planning for more effective community-based manpower development and utilization programs.

B. *Strengthening Local Quality Assurance Efforts*

Specific emphasis would be on: (1) assisting with the establishment of standards of speciality care in those areas of particular RMP competency and experience (*e.g.*, cardiovascular surgery, high voltage radiotherapy) and (2) assisting with the development of norms, criteria, standards and techniques associated with the implementation of the PSRO provisions of the Social Security Amendments of 1972. The RMP's will engage in *pilot efforts only* and will not be responsible for the actual operation of PSROs.

C. *Emergency Medical Services*

RMP's will continue their support of planning and development of certain components (*e.g.*, communications, coordinating councils) of either State or areawide EMs systems. Currently 28 RMP's are engaged in efforts along these lines as a result of $9 million in supplemental funding in June 1972.

D. *Kidney Disease*

Existing RMP efforts to develop a national network for dialysis and transplantation of patients with end-stage kidney disease, will be refocused toward expanding

present capabilities and provide start-up where none presently exists. This is necessary because of the increasing flow of kidney disease patients as a result of Medicare reimbursement for such patients, effective this July 1, as provided by Section 2991, Title II of the Social Security Amendments of 1972.

E. *Hypertension*

RMP's will, in cooperation with NHLI, seek to provide financial and other assistance in the design, development and implementation of community-based hypertension control programs. Major educational efforts for both physicians and the consumers would be emphasized, as well as assistance for those community screening efforts which have local support for continuation.

29. The statutory purposes of the RMP authority are as follows (42 U.S.C. §299):

> (a) through grants and contracts, to encourage and assist in the establishment of regional cooperative arrangements among medical schools, research institutions, and hospitals for research and training (including continuing education), for medical data exchange, and for demonstrations of patient care in the fields of heart disease, cancer, stroke, and kidney disease, and other related diseases;
>
> (b) to afford to the medical profession and the medical institutions of the Nation, through such cooperative arrangements, the opportunity of making available to their patients the latest advances in the prevention, diagnosis, and treatment and rehabilitation of persons suffering from these diseases;
>
> (c) to promote and foster regional linkages among health care institutions and providers so as to strengthen and improve primary care and the relationship between specialized and primary care; and

> (d) by these means, to improve generally the quality and enhance the capacity of the health manpower and facilities available to the Nation and to improve health services for persons residing in areas with limited health services, and to accomplish these ends without interfering with the patterns, or the methods of financing, of patient care or professional practice, or with the administration of hospitals, and in cooperation with practicing physicians, medical center officials, hospital administrators, and representatives from appropriate voluntary health agencies.

30. Grant awards were made to RMP's on October 1, 1973. They were not strictly limited to the five priority activities set forth in the September 7 directive. Activities identified exclusively for heart, cancer and stroke constitute approximately 10% of the total activities supported under those awards.

31. Despite the October 1, 1973 awards, plaintiffs have interpreted the "Priorities and Options" section of the September 7 directive as a restriction on the subject matter over which they are allowed to operate. They allege that as a result of the Health, Education and Welfare directive vital RMP operations have not been started or continued. *See* Affidavits of John Gordon Barrow, M.D., Director of the Georgia Regional Medical Program, September 17, 1973 and October 24, 1973, and attached Exhibits.

32. In late December, 1973, defendants notified members of the plaintiff class that fiscal 1974 funds could be rebudgeted for operational activities outside of the five options but within the 1971 Mission Statement. However, the defendants advised that high emphasis would continue to be placed on the five areas noted in the September 7 directive.

CONCLUSION OF LAW

1. This court has jurisdiction of this matter pursuant to 28 U.S.C. §§1331 and 1361.

2. This action presents a justiciable case and controversy as to fiscal 1973 and 1974. The matters at issue are issues of law. No non-justiciable political question is presented. Defendants herein are not immune from suit as agents of the sovereign.

3. The statutory authorization for Regional Medical Programs (RMP's) lies in the Public Health Service Act, as amended, Title IX, 42 U.S.C. §§299 *et seq.* This authorization was extended to fiscal 1974 by the Health Extension Act of 1973, Pub. L. 93-45, Title I, §110, 87 Stat. 91, June 18, 1973.

4. Fiscal 1973 appropriations for the RMP authority were made by Pub. L. No. 92-334, 86 Stat. 402, as extended, which appropriated sums in the amount of the lower of the House or Senate versions of H.R. 15417, 92d Cong. 2d Sess. The RMP fiscal 1973 appropriation was $150,000,000.

5. The obligation and expenditure of funds appropriated for the RMP authority for fiscal 1973 is subject to Section 601 of the Medical Facilities Construction and Modernization Amendments of 1970, Pub. L. No. 92-296, 85 Stat. 353, 42 U.S.C.A. §§201 note and 2661 note (hereinafter "Sec. 601"). Sec. 601 was extended to fiscal 1974 by the Health Programs Extension Act of 1973, Pub. L. No. 93-45, 87 Stat. 91, and thereby applies to funds appropriated in fiscal 1974 for the RMP authority.

6. By enactment and extension of Sec. 601, the full obligation and expenditure of all funds appropriated for the RMP authority has been mandated by Congress for fiscal 1973 and 1974 without administration imposed freezes, reductions or rollbacks.

7. Until December 19, 1973, the fiscal 1974 Continuing Resolution, Pub. L. No. 93-52, mandated continuing obligation to the members of plaintiff class at the annualized rate of the lesser of the House or Senate versions of H.R. 8877, 93rd Cong. 1st Sess., and prohibited obligation at a lesser rate. This continuing rate for the RMP authority was $81,953,000 on an annualized basis.

8. On December 19, 1973, by the enactment of Pub. L. No. 93-192, $81,953,000 was appropriated for the RMP authority, and at least 95% of this amount has to be obligated by the Executive Branch. Therefore, the fiscal 1974 RMP appropriation which is required to be obligated by the Executive Branch is $77,755,000 at a minimum.

9. Sec. 601, and the fiscal 1973 and 1974 Continuing Resolutions, Pub. Laws No. 92-334 as extended and 93-52 as extended, each specifically remove the authority of the Director of the Office of Management and Budget under 31 U.S.C. §665, to reserve any sums appropriated under these laws. Said Director has no authority under law to hinder or limit the full obligation and allotment of said appropriations.

10. By virtue of Section 111 of Pub. L. No. 93-52, and by virtue of the Proviso of 31 U.S.C. §601(a) (2), this Court has jurisdiction to order that defendants be restrained and permanently enjoined from failing to obligate and expend such fiscal 1973 funds as defendants have unlawfully impounded. *Association of American Medical Colleges v. Weinberger*, Civil Nos. 1794-73 and 1830-73 (D.D.C. decided October 26, 1973.) Defendants herein have caused the dismissal of their appeals in these cases, *Association of American Medical Colleges v. Weinberger*, Nos. 73-2155 and 73-2156 (D.C. Cir., January 9, 1974) on the ground that they are prepared fully to comply with this court's order.

11. The fiscal 1973 appropriation at issue in this cause was required by law to be fully obligated, and expended. Said legal requirement was evidenced by duly enacted statutes. Accordingly, fiscal 1973 appropriations for the plaintiff class in this case may be deemed to have been fully obligated in law under 31 U.S.C. §§200(a) (6) and (8), and 701(a) (2) prior to June 30, 1973. Moreover, by Sec. 501 of Pub. L. No. 93-245, approved January 3, 1974, the Congress has appropriated, "Any funds necessary to be appropriated for full obligation of a fiscal year 1973 appropriation determined to have been unlawfully impounded by the Executive Branch of the United States Government in a civil action filed on or before June 30, 1974. . . ." This statute applies to the impounded fiscal 1973 appropriations in this case.

12. The conduct of defendants in failing and refusing to obligate and release to members of the plaintiff class the full amount of fiscal 1973 and 1974 funds duly appropriated by Congress for obligation to and expenditure by said class is unlawful, and such conduct is not authorized by Article II of the Constitution of the United States nor by any other law or authority.

13. The conduct of defendants in requiring members of the plaintiff class to engage only in operational activities which can be productively completed by June 30, 1974 is unlawful. By the extension of the RMP authority in the Health Programs Extension Act of 1973, Pub. L. 93-45, Congress has indicated that RMP operational activities should be permitted to proceed unhindered by such restrictions, and this should be done until Congress indicates a contrary intention. *Local 2677 v. Phillips*, 358 F. Supp. 60, 79 (D.D.C. 1973) (Jones, J.).

14. The conduct of defendants since February 1973 in maintaining a continuing program to effect the termination of the RMP authority in the face of clear

Congressional mandate that it be continued is unlawful. Defendants have no authority under Article II of the Constitution or any law to effect the termination of the RMP authority in the face of clear statutory intent and direction that it be continued.

15. Under the explicit command of Section 601, there is no remaining constitutional authority in the President and these defendants to terminate the statutory program in question here for reasons offered in the affidavits of Messrs. Stein, O'Neill and Pahl, which reasons are completely unrelated to the purposes of the Act, and therefore the defendants must process applications and exercise their discretion to review individual applications for RMP grants on their merits. *See Kendall v. United States ex rel. Stokes*, 37 U.S. 522 (1838); *Youngstown Sheet & Tube v. Sawyer*, 342 U.S. 579 (1952); *State Highway Commission v. Volpe*, 479 F.2d 1099 (8 Cir. 1973); *Local 2677 v. Phillips*, 358 F. Supp. 60 (D.D.C. 1973); *National Council of Community Mental Health Centers v. Weinberger*, 361 F. Supp. 897 (1973); *Association of American Medical Colleges v. Weinberger*, (two cases) Civil Action Nos. 1794-73 and 1830-73 (D.D.C. decided October 26, 1973); *Commonwealth of Massachusetts v. Weinberger*, Civil Action No. 1308-73 (D.D.C. decided July 26, 1973); *Commonwealth of Pennsylvania v. Weinberger*, Civil Action No. 1125-73 (D.D.C. decided November 21, 1973); *Commonwealth of Pennsylvania v. Weinberger*, Civil Action No. 1606-73 (D.D.C. decided December 11, 1973).

16. With respect to the plaintiffs' contentions relating to the 1971 Mission Statement and the "Priorities and Options" section of the September 7, 1973 directive, the court notes that the 1971 Mission Statement was issued in accordance with the defendants' responsibility to carry out and enforce Title IX of the Public Health Service Act.

By September, 1973 circumstances surrounding the operation of RMP's had so changed that the defendants deemed it appropriate to issue new guidelines in the form of the above-mentioned "Priorities and Options". Obviously, legitimate time and funding constraints necessitate lessened RMP activity. Therefore, the defendant administrators, if faced with such restraints, must be allowed to exercise their discretion in finding ways, such as establishing priorities, to maximize the effectiveness of the program. However, they must do so in a manner consistent with congressional, not self-imposed, time and budgetary limitations. In addition, the defendant administrators may not refuse to accept applications for programs in subject areas that are within the purposes outlined by the statute.

/s/ Thomas A. Flannery
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 1807-73

NATIONAL ASSOCIATION OF REGIONAL MEDICAL PROGRAMS, INC., et al.,

Plaintiffs,

v.

THE HONORABLE CASPAR W. WEINBERGER, et al.,

Defendants.

FINAL ORDER

The Court having entered its Findings of Fact and Conclusions of Law this 7th day of February, 1974, it is hereby

ORDERED:

1. That defendants be, and hereby are, directed to take such administrative action as is necessary with such speed as is administratively feasible to implement the obligation to members of the plaintiff class herein, as heretofore certified (all regional medical programs operating pursuant to Title IX of the Public Health Service Act as amended, 42 U.S.C. §§299 *et seq.*), of the full appropriated sum for the Regional Medical Program (RMP) authority for fiscal 1973, to wit: $150,000,000 and shall obligate such amount pursuant to all requisite and proper reviews and approvals of specific operational activities.

2. Not later than June 30, 1974, defendants shall complete all necessary steps to obligate and grant to members of the plaintiff class herein such appropriated sums for the RMP authority for fiscal 1974, as are not authorized to be withheld by Pub. L. No. 93-192, and

shall obligate such amount pursuant to all requisite and proper reviews and approvals of specific operational activities.

3. Defendants shall obligate funds to members of the plaintiff class under terms and conditions and for expenditure during such time periods as were usual and normal prior to February 1973, when defendants began their unlawful impoundments. Defendants are permanently restrained and enjoined from requiring the members of plaintiff class to delay the expenditure of the aforesaid appropriated funds after the obligation thereof to such class members.

4. Defendants shall rescind in writing all directives inconsistent with this Order, and notify recipients of such directives of their recission.

5. Defendant Ash is permanently restrained and enjoined from taking or permitting to be taken, any action to hinder or limit the obligation, grant and expenditure of the full amounts of funds ordered obligated by this Order; and it is

FURTHER ORDERED and ADJUDGED that judgment pursuant to 28 U.S.C. §2201 consistent with the terms of the Findings of Fact and Conclusions of Law filed this date herein be entered in favor of the plaintiffs; and it is

FURTHER ORDERED that this Order shall not be stayed by this Court pending appellate review and plaintiffs shall have their normal costs for this litigations.

/s/Thomas A. Flannery

February 7, 1974
Date

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 1807-73

NATIONAL ASSOCIATION OF REGIONAL MEDICAL PROGRAMS, INC. *et al.*,

plaintiffs,

v.

THE HONORABLE CASPAR W. WEINBERGER, *et al.*,

defendants.

ORDER

The parties having agreed to amendment of this Court's Final Order of February 7, 1974, and members of the plaintiff class having been notified of the proposed amendment, and no objection having been made thereto by any such class member, it is this 22nd day of July, 1974,

ORDERED that

1. This Court's Final Order entered February 7, 1974 be and hereby is amended by the addition of the following two sub-paragraphs immediately following paragraph 1 of that Order:

A. Provided, however, the defendant Secretary of Health, Education, and Welfare, pursuant to the authority contained in Section 910 of the Public Health Service Act, 42 U.S.C. §299j, may obligate on or before 90 days after entry of this Order, not more than $5 million of the heretofore unobligated portion of the aforesaid fiscal year 1973 appropriation to grantees and contractors other than the Regional Medical programs constituting the plaintiff class. Such grants and contracts under

Section 910 of the Public Health Service Act may be made only for the following activities:

I. Obligations to augment current efforts in developing the state of the art of health planning with major emphasis on the development of criteria for expensive facilities and services such as radiation therapy and open-heart surgery and,

II. Obligations to the following grant and contract activities:

(1) Joint Commission on Accreditation of Hospitals

(2) American Heart Association—Joint Committee on Heart Disease Facilities

(3) Joint Committee on Stroke Facilities—American Neurological Association

(4) Metropolitan General Hospital, Cleveland, Ohio, Epidemiological Study of Kidney Diseases in Yugoslavia

(5) Connecticut State Medical Society Ambulatory Care Study

(6) Supplement to Connecticut State Medical Society Ambulatory Care Study

(7) Southwestern Pediatric Pulmonary Center, Albuquerque, New Mexico

III. No portion of the aforesaid funds to be obligated under Section 910 may be expended for purposes of planning the assumption of regulatory roles in the health field on the part of State governments, or any other activities not listed above. When the aforesaid $5 million is obligated defendants will make available documents showing the specified purposes for which the funds have been obligated.

B. Defendants are directed to implement the obligation of any portion of the aforesaid $5 million remaining unobligated 90 days after the entry of this Order, to members of the Regional Medical Program plaintiff class, pursuant to approved applications therefore, with such speed as is administratively feasible.

2. Defendants' Combined Motions for Additional Findings of Fact and Amendment of Order are withdrawn by agreement of the parties, upon entry of this Order. All other motions filed by the parties since February 7, 1974 are likewise withdrawn by agreement of the parties, upon entry of this order.

3. Upon the entry of this Order, all parties shall be deemed by their consent thereto to have waived any rights of appeal with respect to this Order and the Final Order entered February 7, 1974, as amended by this Order.

/s/ Thomas A. Flannery
United States District Judge

CONSENTED TO:

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 1807-73

NATIONAL ASSOCIATION OF REGIONAL MEDICAL PROGRAMS, INC., et al.,

Plaintiffs,

v.

HONORABLE CASPAR W. WEINBERGER, et al.,

Defendants.

ORDER

This matter is before the court on plaintiffs' motion to compel compliance with the final order as amended and defendants' opposition thereto. In the final order as amended this court declared illegal the impoundment of funds appropriated for Regional Medical Programs' authority and ordered defendants to take steps to carry out the full Congressional appropriation. Defendants, in carrying out the court's final order, divided the RMP appropriation into funds destined to be granted directly to the RMP's and funds destined to be used by defendants for direct operation expenses, the expenses of administration of the statutory program. In both fiscal 1973 and fiscal 1974 defendant authorized several million dollars for direct operations expenses, with the rest of the RMP appropriation being authorized for obligation to the RMP's.

In both fiscal 1973 and fiscal 1974 defendants did not actually need all of the funds authorized for direct operations expenses. A total of $1,644,825 eventually was determined not to be necessary for direct operations expenses. These funds were allowed by defendants to

lapse back into the United States Treasury. Plaintiffs contend that when defendants discovered that such funds were not necessary for direct operations expenses, defendants, pursuant to this court's final order, were required to make these unexpended direct operations funds available for obligation to the RMP's.

The court will reject plaintiff's contention. The result plaintiffs seek is not required by or intended to be required by this court's final order. The court's final order, together with its findings of fact and conclusions of law, sets forth a judicial determination that the impoundment previously carried on by defendants was illegal. The court, in essence, ruled that defendants must take all steps necessary to carry out the Congressional appropriation, namely to undertake the continued administration and implementation of the RMP authority. The court believes that in all significant respects defendants have been faithful in carrying out Congress' will. As apparently is normal defendants divided the appropriation between grants and contracts and direct operations expenses. They reported to Congress the amounts of money devoted to each subdivision. This appears to be regular agency practice in carrying out a Congressional appropriation. Further, it apparently is normal when funds in one activity are not fully expended to allow those funds to lapse into the Treasury. This occurred in the instant case. Contrary to plaintiffs' allegations of bad faith on defendants' part, there is no evidence that defendants purposefully diverted an unusually large amount of funds to direct operations expenses or that they purposefully allowed funds to lapse in violation of this court's order. Since the court finds that defendants have complied substantially with the court's final order as amended, it is by the court this 3rd day of September, 1975,

ORDERED that plaintiffs' motion be, and the same hereby is, denied.

/s/ Thomas A. Flannery

NOT TO BE PUBLISHED – SEE LOCAL RULE 8

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT
September Term, 1976
Civil 1807-73

No. 76-1015

National Association of Regional
Medical Programs, Inc., et al., Appellants

v.

The Honorable F. David Mathews, individually
and as Secretary of Health, Education and Welfare, et al.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Before: TAMM, MacKINNON and ROBB, Circuit Judges

JUDGMENT

This cause came on for consideration on the record on appeal from the United States District Court for the District of Columbia and briefs were filed by the parties. On consideration of the foregoing, it is

ORDERED AND ADJUDGED by this Court that the judgment of the District Court appealed from in this cause is hereby affirmed, for the reasons set forth in the attached memorandum.

Per Curiam
For the Court

/s/George A. Fisher
George A. Fisher
Clerk

National Assoc. of Regional Medical Programs v. Mathews—No. 76-1015

MEMORANDUM

The National Association of Regional Medical Programs (NARMP) seeks to have this court reverse the district court's finding that its order of February 7, 1974 was complied with by the Department of Health, Education and Welfare (HEW). This district court order clearly says that the illegally impounded funds were to be obligated and expended as was "usual and normal prior to February 1973, when defendants began their unlawful impoundments." Final Order of February 7, 1974, ¶3. In the order appealed from, the district court found that it is "normal" for HEW to divide the funds between direct operations and grants. HEW followed its normal practice in dividing the impounded funds therefore, and there is no evidence to suggest that an unusually large amount of the funds were diverted into the direct operations category. As we saw in *National Council of Community Mental Health Centers v. Mathews,* Nos. 75-1335,–1353 (D.C. Cir. Nov. 9, 1976), it is also normal for the unexpended balances of these funds, whether they are labeled direct operations or grants, to lapse into the United States treasury at the end of each fiscal year.

This being so, we can find no clear factual error or material error of law in the district court's findings. The judgment appealed from must therefore be affirmed.

No. 76-1265

In the Supreme Court of the United States

OCTOBER TERM, 1976

NATIONAL ASSOCIATION OF REGIONAL MEDICAL PROGRAMS, INC., ET AL., PETITIONERS

v.

JOSEPH A. CALIFANO, JR., SECRETARY OF HEALTH, EDUCATION, AND WELFARE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

WADE H. MCCREE, JR.,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1265

NATIONAL ASSOCIATION OF REGIONAL MEDICAL PROGRAMS, INC., ET AL., PETITIONERS

v.

JOSEPH A. CALIFANO, JR., SECRETARY OF HEALTH, EDUCATION, AND WELFARE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

This litigation originated when petitioner National Association of Regional Medical Programs (NARMP) brought suit against the Secretary of Health, Education, and Welfare and others to compel the obligation of certain fiscal 1973-1974 funds appropriated under Title IX of the Public Health Service Act, as added, 79 Stat. 926, and amended, 42 U.S.C. 299 *et seq*. The complaint alleged that the respondents had unlawfully impounded the funds (Pet. App. 1A). The district court held that the impoundments were unlawful and on February 7, 1974, entered an order requiring that the respondents obligate the funds "to members of the plaintiff class *under terms and conditions* and for expenditure during such time periods *as were usual*

and normal prior to February 1973 when defendants began their unlawful impoundments" (Pet. App. 18A; emphasis added). By further order of July 22, 1974, all parties consented to the February 7, 1974, order and waived any right of appeal (Pet. App. 21A).

Thereafter, petitioners' counsel commenced ancillary proceedings for attorney's fees. In the course of such litigation, petitioners' counsel learned that the Department of Health, Education, and Welfare, in accordance with its normal procedures, had allocated a portion of the released funds for direct operational and overhead expenses. At the end of the fiscal year, $1,644,825 of these funds proved to be unneeded for such administrative expenses and, again in accordance with normal procedures, were permitted to "lapse" into the United States Treasury. Petitioners thereupon moved in the district court to compel the Secretary to obligate an additional $1,644,825 to them, maintaining that the court's final order of February 7, 1974 (as amended July 22, 1974) required that all appropriated funds actually be expended (Pet. App. 17A, 19A). The district court declined to do so, stating (Pet. App. 23A):

> The result plaintiffs seek is not required by or intended to be required by this court's final order. * * * The court believes that in all significant respects defendants have been faithful in carrying out Congress' will. As apparently is normal defendants divided the appropriation between grants and contracts and direct operations expenses. They reported to Congress the amounts of money devoted to each subdivision. This appears to be regular agency practice in carrying out a Congressional appropriation. Further, it apparently is normal when funds in one activity are not fully expended to allow those funds to lapse into the Treasury. This occurred in the instant case. Contrary to plaintiffs' allegations of bad faith on defendants' part, there is no evidence that defendants purposefully diverted an unusually large amount of funds to direct operations expenses or that they purposefully allowed funds to lapse in violation of this court's order.

The court of appeals affirmed *per curiam*, finding "no clear factual error or material error of law in the district court's findings" (Pet. App. 26A).

This case turns upon its unique and particular facts and raises no important matter of law that merits review by this Court. The only issue is whether the Secretary of Health, Education, and Welfare properly carried out the terms of the order issued by the district court at the conclusion of the litigation on the merits. That order required that the Secretary obligate and expend the funds in the "usual and normal" manner. The court that issued the order determined that the Secretary had complied with it. There is no reason for this Court to consider whether the district court has misconstrued its own order.[1] The

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[1]Petitioners suggest (Pet. 12-13) that Section 601 of the Medical Facilities Construction and Modernization Amendments of 1970, 84 Stat. 353, 42 U.S.C. 201 note, requires a different result. That statute provides only that appropriated funds "shall remain available for obligation and expenditure" until the end of the fiscal year for which appropriated. The district court correctly concluded that this statute did not prevent the Secretary's allocation of funds to administrative expenses and the routine lapse of unexpended funds so allocated into the treasury at the conclusion of the fiscal year (Pet. App. 23A). Petitioners' reliance on Section 111, Act of July 1, 1973, 87 Stat. 134, 31 U.S.C. (Supp. V) 665b, and Section 501 of the Supplemental Appropriations Act, 1974, 87 Stat. 1077, also is misplaced. The text of those statutes, and also the legislative history cited by petitioners (Pet. 14-15), show that their purpose and effect was simply to insure that the

court of appeals, in reviewing this case, correctly observed (Pet. App. 26A):

> This district court order clearly says that the illegally impounded funds were to be obligated and expended as was "usual and normal prior to February 1973, when defendants began their unlawful impoundments." Final Order of February 7, 1974, para. 3. In the order appealed from, the district court found that it is "normal" for HEW to divide the funds between direct operations and grants. HEW followed its normal practice in dividing the impounded funds therefore, and there is no evidence to suggest that an unusually large amount of the funds were diverted into the direct operations category. As we saw in *National Council of Community Mental Health Centers* v. *Mathews,* Nos. 75-1335,-1353 (D.C. Cir. Nov. 9, 1976), it is also normal for the unexpended balances of these funds, whether they are labeled direct operations or grants, to lapse into the United States treasury at the end of each fiscal year.
>
> This being so, we can find no clear factual error or material error of law in the district court's findings.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.,
Solicitor General.

MAY 1977.

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expiration of the fiscal year would not place disputed funds beyond the reach of courts adjudicating impoundment claims. Those statutes do not bear on the question whether unexpended funds that had been properly allocated for administrative expenses lapse upon expiration of a fiscal year after final adjudication of an impoundment claim on its merits.